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Supreme Court, U.S.
FILED
SEP 1 1995
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No. 95-233

In The

Supreme Court Of The United States

October Term, 1995

RAYTECH CORPORATION,

Petitioner,

v.

EARL WHITE; YVONNE WHITE; PASQUALE DICINTIO; MARIE DICINTIO; LARRY BENZIE, EXECUTOR OF THE ESTATE OF EDWARD BENZIE; EUGENE KLINGENBERGER; MARGI KLINGENBERGER; JOHN DOE & ALL OTHERS SIMILARLY SITUATED,

Respondents.

BRIEF OF RESPONDENTS JOHN DOE AND OTHER FUTURE CLAIMANTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented for Review

1. Where Raytech's liability, as a successor to Raymark, for Raymark's asbestos-related torts had been litigated and determined as an essential part of a valid and final District of Oregon judgment, and affirmed by the United States Court of Appeals for the Ninth Circuit, did the court below err in upholding the discretion of the district court to bar Raytech from relitigating that issue?

2. Where two United States Courts of Appeal and the District of Connecticut have rejected Raytech's claim that the District of Oregon judgment was founded on unique Oregon law, should this Court dismiss the petition for certiorari?

3. Where two United States Courts of Appeal and two United States District Courts have found that Raytech's alleged payments to Raymark, as required by promissory notes, do not affect Raytech's liability as a

successor to Raymark, should this Court dismiss the petition for certiorari?

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Statement of the Case

In March 1989 Raytech Corporation ("Raytech") filed a petition in the United States Bankruptcy Court for the District of Connecticut under Chapter 11 of the Bankruptcy Code. In June 1989 Raytech brought an adversary proceeding in the bankruptcy court. Its complaint alleged that it and its subsidiaries were (and would continue to be) defendants in numerous jurisdictions in lawsuits asserting Raytech's liability for torts arising from asbestos-related activities of Raymark Corporation and/or Raymark Industries (collectively, "Raymark"). (Complaint, paras. 28, 30). Raytech sought a nationwide adjudication that it was not responsible, as a successor in interest or otherwise, for Raymark's asbestos liabilities.

As representative defendants in this purported class action, Raytech named four claimants whose asbestos-related actions

against Raytech were pending in Ohio, South Carolina, Indiana and New Jersey. "John Doe" was also named as a party, identified as:

> an unknown individual who was exposed to the Industries' [i.e. Raymark Corporation and Raymark Industries, Inc.] asbestos products before March 10, 1989, the date of Raytech's bankruptcy petition. The Defendant Doe has not manifested any symptoms of asbestos-related disease, but will do so in the future.

Complaint Paras. 5-9. The court subsequently appointed Robert F. Carter as Guardian Ad Litem for John Doe and other future claimants in this case. R. 71, 116.

On Raytech's motion the district court withdrew its order of reference to the bankruptcy court for the purpose of trying the adversary proceeding, R. 3; and granted the creditors' committee's motion to intervene as a defendant in the case. R. following 70.

The district of Connecticut received voluminous testimony and documentary evidence. That court ruled (Appendix to

Petition for Writ of Certiorari, page 18) that *Schmoll v. ACandS, Inc.*, 703 F. Supp. 868 (D. Or. 1988), affirmed, 977 F.2d 499 (9th Cir. 1992) (Appendix to Petition for Certiorari, pages 57, 55) collaterally estopped Raytech from relitigating its liability as a successor to Raymark. The district court deferred ruling on other counts of Raytech's complaint.

The district court then transferred the adversary proceeding to the United States District Court for the Eastern District of Pennsylvania, with other asbestos cases consolidated before the Honorable Charles R. Weiner, J. Subsequently, Judge Weiner certified the district of Connecticut's decision under Fed. R. Civ. P. 54(b) and Bankruptcy Rule 7054(b). Appendix 4. Appeal to the United States Court of Appeals for the Third Circuit, and its decision and judgment, ensued.

The Oregon district court, in *Schmoll*

v. ACandS, supra, found facts meticulously describing the metamorphosis of Raymark into Raytech, the basis of Raytech's liability as a successor to Raymark. The United States Court of Appeals for the Ninth Circuit upheld the district court's fact-finding when it affirmed "the district court's judgment on the grounds stated in its opinion." Appendix 56. The court below observed that the Oregon district court had described "the steps in the restructuring...in graphic detail." *Raytech v. White,* 54 F. 3d 187, 189 (3d Cir. 1995) (Appendix 2-3). And the District of Connecticut was thoroughly familiar with the Oregon court's "exhaustive review of the extensive corporate restructurings ultimately resulting in Raytech's creation in June 1986, and the corporate maneuverings which followed..." Appendix 25. The core facts are:

1. Asbestos litigation caused Raymark

Industries to suffer "severe financial declines...Between 1982 and 1988, Raymark Corporation reorganized its corporate structure in response to this financial decline." *Schmoll v. ACandS*, *supra*, 703 F. Supp. at 869.

2. In "a complex series of transactions," *id.*, "(i)n June 1986, Raymark Corporation created Raytech..." *Id.* at 870. Raytech and Raymark Industries were both rendered wholly owned subsidiaries of Raymark Corporation. In further transactions later that year, "Raytech... became the parent of Raymark Corporation. Raytech then owned 100 percent of the stock of Raymark Corporation, which owned 100 percent of the stock of Raymark Industries." *Id.* at 870-871.

3. "In 1987, Raytech purchased Raymark Industries' two most profitable assets, the Wet Clutch and Brake Division and RIPG stock." *Id.* at 871. Neither of these

entities had been tainted by the threat of asbestos liability. *Id.* The Wet Clutch & Brake Division was the "largest of Raymark Industries' business operations, had significant profit potential," and was expected to provide a significant stream of future income. Most of the consideration paid for these entities consisted of Raytech stock and unsecured notes. *Id.*

4. Finally, in 1988 "Raytech sold Raymark Corporation, and thus Raymark Industries, to Asbestos Litigation Management (ALM) for $1 million," most of it in unsecured notes, "for all Raymark Corporation's assets and liabilities...ALM now owns the stock of Raymark Corporation, whose only asset is Raymark Industries' stock." *Id.* at 871.

5. In summarizing, the *Schmoll* court concluded that "Raymark Industries had valuable assets, RIPG and Wet Clutch & Brake. It conveyed these assets to Raytech,

which was owned by Raymark Industries' former shareholders. This transaction left Raymark Industries with staggering asbestos liabilities, unprofitable operations, unsecured notes, and stock which could not be sold in large blocks without a deep discount." *Id.* at 873. As the result of the asset transfers, Raymark had become "no more than a corporate shell unable to satisfy its asbestos-related obligations." *Id.* at 874. See, also, *Raytech v. White, supra*, 54 F.3d at 192 (Appendix 8).

6. The Oregon district court expressly found that Raymark's transfer of profitable assets significantly damaged the asbestos plaintiffs, and future asbestos claimants as well: "Present and future asbestos tort claimants, as Raymark Industries' potential creditors, were likewise left with little in the transaction. The money Raytech paid for Raymark Industries' profit-generating assets will not adequately compensate present and

future claimants. If Raytech escapes liability for Raymark Industries' torts, these creditors will no longer have access to Raymark Industries' valuable assets or to the potential stream of profits generated by these assets." *Id.* at 873.

7. The district court also expressly found that the complex series of transactions lacked the ingredients of a bona fide business purpose: "Raytech purchased Raymark Corporation's two valuable assets and then sold the remainder to ALM for $1 million. It is inconceivable that in an arms-length corporate transaction, a buyer would have purchased an entity so lacking in assets and laden with liabilities." *Id.* at 874.

8. The district court found that the transactions' purpose was to escape liability for present and future asbestos claims: "...the elaborate transfer of assets was designed...with the improper purpose of

escaping asbestos-related liabilities." *Id.* 873 & 874.

Summary of Argument

Raytech offers no good reason to grant certiorari. Two courts of appeal, as well as the Connecticut district court, have reviewed the Oregon district court's decision and held that its imposition of successor liability flowed naturally from established and uniform law. Two courts of appeal, and district courts in Oregon and Connecticut, have examined Raytech's alleged payments to Raymark pursuant to its promissory notes, and its claim that those payments somehow absolve it of liability as Raymark's successor. All have rejected that claim. Moreover, when Raytech asked the Eastern District of Pennsylvania to vacate its Rule 54(b) certification and to reconsider the ruling of the District of Connecticut on the ground, *inter alia*, of Raytech's post-*Schmoll* payments, that court

rejected the invitation as well. (Order of May 5, 1994, Weiner, J.).

The third circuit's decision breaks no new ground, and conflicts with no relevant decision or rule of law. This Court should therefore deny the petition.

Argument

The Court Below Correctly Held That the District Court Did Not Abuse its Discretion When it Barred Raytech from Relitigating its Liability for Raymark's Asbestos-Related Torts.

The court of appeals correctly held that the district court had properly exercised its "broad discretion," *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979), to bar Raytech from litigating factual and legal claims that it had already exhaustively litigated in *Schmoll v. ACandS, supra*.

In at least three fora-- in the court below, in its appeal to the ninth circuit of *Schmoll v. ACandS*, and in the District of Connecticut-- Raytech has persisted in a

single argument: because the Oregon district court omitted the talismanic word 'fraudulent' when it described the parties' attempted evasion of asbestos-related liabilities, that court departed from the traditional rule of successor liability. Hence, says Raytech, a crucial element for invoking collateral estoppel is unsatisfied. "Of the traditional four factors relevant to collateral estoppel, only one-- whether there is an identity of issues-- is pressed by Raytech." *Raytech v. White*, 54 F. 3d at 191 (Appendix 6).

Raytech is simply wrong when it asserts that the *Schmoll* trial court's omission of the word 'fraudulent' has any substantive consequence. This Court, for example, has explained "the general rule of corporate liability" that a successor corporation is "responsible for the seller's debts or liabilities" when "the transaction is entered into to escape liability." *Golden*

State Bottling Co. v. NLRB, 414 U.S. 168, 182-183 n.5 (1973). Surely the *Schmoll* trial court's similar omission of the word 'fraudulent' is insignificant. See, also, *Raytech v. White, supra*, 54 F. 3d at 191-193 (Appendix 6-10); Ruling and Order, United States District Court for the District of Connecticut, Appendix 32-35; *Schmoll v. ACandS, supra*, 977 F. 2d 499 (Appendix 56).

Raytech's is a weak argument indeed: the *Schmoll* district court found that the Raymark-Raytech restructuring "was designed with the **improper** purpose of escaping asbestos-related liabilities," 703 F. Supp. at 874 (emphasis added). Had that court replaced 'improper' with 'fraudulent,' Raytech's argument would disappear.

All reviewing courts have correctly concluded that *Schmoll* correctly expresses the national consensus that a successor corporation is liable for the debts of its

seller when asset transfers occur in the manner documented in *Schmoll*, with an intention to evade and hinder creditors' claims.

The *Schmoll* trial court's findings of fact are a fraudulent transfer's standard indicia. All jurisdictions would have deemed the Raymark-Raytech asset transfers fraudulent, because they occurred with an intention to hinder, delay or defraud creditors. *Schmoll* found precisely that; in fact, the *Schmoll* trial court footnoted with evident approval trial counsel's argument that "the court could hold as a matter of law that the transactions constituted fraudulent conveyances..." 703 F. Supp. at 874 n. 11. See, Uniform Fraudulent Transfer Act, 7A Uniform Laws Annotated (West 1985) 652-653, Section 4(a); and Section 4(b) (reciting the 'badges of fraud,' numerous indicia of which-- e.g., insider transfers, retention and control by original owners,

suit-avoidance timing, etc.-- are identified by the *Schmoll* trial court); Uniform Fraudulent Conveyance Act, *id.* 509, Section 7; 4 Collier, *Bankruptcy* Section 548.02 [3], at 548-31 (15th Rev. Ed. 1994) (Statute of Elizabeth prohibiting such transfers is "a part of the common law or statutory law of every American jurisdiction.").

Raytech's claim that the district of Oregon went out on a "public policy" or "social policy" limb, or abandoned an established line of decisions, is not credible. The Ninth Circuit's affirmance of *Schmoll* said nary a word about any purported departure from respected authority. Courts of Oregon-- like courts elsewhere-- have never required a mechanical incantation of the word 'fraudulent' to impose successor liability. They have vigilantly imposed such liability where "'the dissolution of [predecessor] and the organization of [successor] had but one purpose, and that

was to avoid the contractual liability of [predecessor]...[E]quity will look through the form at the substance'" to impose liability on the successor. *Peterson v. Harville*, 445 F. Supp. 16, 24 (D. Or. 1977), affirmed, 623 F.2d 611 (9th Cir. 1980) (brackets as quoted) (quoting from *Dairy Cooperative Ass'n v. Brandes Creamery*, 147 Or. 488, 496, 30 P.2d 338, 341 (1934)). See, also, *Western Helicopter Services v. Rogerson Aircraft*, 728 F. Supp. 1506, 1510 (D. Or. 1990), where the court explained that *Schmoll* "applied the traditional rule regarding successor liability in a products liability action." *Schmoll*, the court said, "found that the fourth exception to the traditional rule applied because the successor corporation had been formed for the purpose of escaping liability for judgments against its predecessor in asbestos litigation." This "fourth exception," the court explained, quoting

established authority, applies "where the transaction is entered into fraudulently in order to escape liability..."

Schmoll conforms with the nationwide rule and its exceptions. 54 F.3d at 190, 192n.6 (Appendix 5, 9). Two courts of appeal and two district courts have thoroughly examined that rule, the relevant exception, and their applicability to the facts of this case. The court below and the Connecticut district court did so consistently with *Parklane Hosiery Co. v. Shore*, *supra*, and *Montana v. United States*, 440 U.S. 147 (1979). Raytech advances no reason for this Court to revisit issues already so redundantly considered.[1]

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[1] The decision of this Court in *Case v. Los Angeles Lumber Products Co., Ltd.*, 308 U.S. 106 (1939), cited by the petitioner, is wholly inapposite, involving only the issue of whether shareholders as opposed to bondholders deserved some participation in a corporate reorganization. The Raytech shareholders may argue to the bankruptcy court in the underlying Chapter 11

Before five different courts, in addition to this Court, Raytech has tendered information of alleged payments of some amounts due under its promissory notes to Raymark; Raytech has argued unsuccessfully that those payments absolve it from liability, whether as Raymark's successor or to avoid imposition of collateral estoppel. In this case's current incarnation, Raytech offered this argument to the Connecticut district court and the third circuit; and, also, to the Eastern District of Pennsylvania in failing to gain reconsideration of the Connecticut district court's ruling. As the third circuit noted of Raytech's argument, it "is in fact an updated version of a similar argument it

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proceeding that their interest should be reflected in a Chapter 11 plan of reorganization; and in fact they do make this argument in the District of Connecticut bankruptcy proceedings. But this issue has no bearing on the appropriateness of the holding of the third circuit with respect to successor liability.

made on appeal of the *Schmoll* decision before the Court of Appeals for the Ninth Circuit." 54 F.3d at 194 (Appendix 14). There, as in the Oregon district court, Raytech unsuccessfully argued that its payments insulated it from liability as Raymark's successor.[2] *Id.*

No purpose is served by according Raytech yet another forum. Courts that have already conscientiously examined Raytech's

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[2] Respondents in fact dispute Raytech's assertion of payments of $63 million to Raymark. The assertion is based on an affidavit of its treasurer, Albert Canosa, Appendix L of Raytech's Brief on appeal dated July 5, 1994. The affidavit reveals that payments by Raytech were suspended on the $33 million GmbH note, so that the note was "restructured" to a new $40 million note in December 1992. Further, the April 1993 and April 1994 payments of 750,000 Deutchmarks, plus interest, were also "suspended -- future indem to apply," that is, credits taken by Raytech for claimed debts of Raymark to Raytech under indemnification agreements. The November 17, 1989, "payment" of $7,684,750 was the assignment from Raymark to Raytech of "lawyer notes" for litigation defense costs, which were later settled by Raytech for a greatly reduced amount.

claims have determined, unanimously, that Raytech is liable as Raymark's successor and that the issue is now concluded. This Court should vindicate the "fundamental precept of common-law adjudication," *Montana v. United States*, *supra*, 440 U.S. at 153, that an issue once determined by a competent court is conclusive, by denying the petition for writ of certiorari.

Conclusion

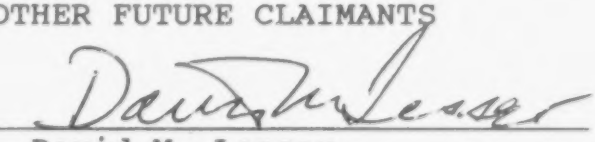
Schmoll v. ACandS, Inc., 703 F. Supp. 868 (D. Or. 1988), affirmed, 977 F.2d 499 (9th Cir. 1992), held that Raytech was a successor in liability for Raymark's asbestos-related torts. The district court below properly precluded Raytech from relitigating that liability. The United States Court of Appeals for the Third Circuit properly affirmed. The issues that Raytech has presented for adjudication involve no unresolved areas of law, or conflict between or among circuit courts or

state courts. In fact, the decisions of circuits and districts that have examined Raytech's claims harmonize with one another.

Appellee John Doe and other future claimants therefore respectfully submit that this Court should deny the petition for certiorari.

Respectfully Submitted,

JOHN DOE AND OTHER FUTURE CLAIMANTS

BY: 

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